



November 28, 2007

Ex Parte Presentation

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach Metropolitan Statistical Areas, WC Docket No. 06-172*

Dear Ms. Dortch:

PAETEC Communications, Inc. ("PAETEC") submits this ex parte communication in response to the November 16, 2007 filing by Verizon in the above-captioned proceeding ("Verizon Nov. 16 Ex Parte").¹

PAETEC is a premier national provider of competitive wireline local, long distance, data and Internet services. Once PAETEC completes its acquisition of McLeodUSA Inc. ("McLeod"), anticipated in the first calendar quarter of 2008, the combined company will be one of the nation's largest communications service providers. While PAETEC has traditionally used high capacity special access services as the wholesale last mile input for its retail services, as a result of its merger with US LEC Corp. earlier this year, PAETEC understands the impact that ILEC UNE loops and transport have as wholesale price controls in a market otherwise subject to monopoly control. McLeod, through its telecom operating subsidiary, is a purchaser of UNE loops (primarily from Qwest and AT&T) and, thus, any action taken by the Commission in this proceeding has relevance to PAETEC's future business plans.

PAETEC has not to date participated in this proceeding. However, in light of its overall concern with the forbearance process and Verizon's last

¹ Letter from Evan T. Leo, Counsel to Verizon, to Marlene H. Dortch, WC Docket No. 06-172 (filed Nov. 16, 2007).

minute attempt to change the rules of the game in its Nov. 16 Ex Parte, PAETEC feels compelled to express its concerns now. While PAETEC is well aware of the forbearance authority granted to the Commission by Congress in Section 10 of the Communications Act, the attempt in the Verizon Nov. 16 Ex Parte to eviscerate the framework for determining whether to grant forbearance from Section 251(c)(3) UNE unbundling obligations is inconsistent with both Section 10 and the governing test established in the *Omaha Forbearance Order*.² If successful, Verizon's ploy would have widespread and detrimental effects not just within the six Verizon MSAs at issue in this proceeding, but to the entire UNE framework put in place by Congress, and indeed to the continued development of competition throughout the U.S. telecommunications industry.

In its *Omaha Forbearance Order*, the Commission enunciated what PAETEC believes is an inappropriately low standard for examining and granting requests to forbear from application of the unbundling requirements of Section 251(c) (3).³ Nonetheless, even in that order, the Commission stated that its decision to grant limited forbearance in certain Omaha wire centers was "based on the development of sufficient facilities-based competition and other factors . . ." ⁴ As the Commission subsequently explained in the *Anchorage UNE Forbearance Order*, that standard involves several factors and at least three prongs:

. . . [W]e: (i) examine the level of retail competition and the role of the wholesale market in the study area to determine as a threshold matter whether the Anchorage study area is sufficiently competitive to support forbearance; (ii) examine the extent to which competitive facilities deployment is responsible for this level of competition and how the market would be affected in the absence of access to UNEs; and (iii) expressly condition the relief we grant ACS on the requirement that ACS provide continued access to loops at just and reasonable rates, terms, and conditions in the manner set forth below

² Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area, Memorandum Opinion and Order, 20 FCC Rcd 19415 (2005) ("*Omaha Forbearance Order*"), aff'd *Qwest Corporation v. Federal Communications Commission*, Case No. 05-1450, (D.C. Cir. Mar. 23, 2007).

³ *Omaha Forbearance Order* at paras. 57-60.

⁴ *Id.* at para. 57.

after ACS is no longer required to provide UNEs in the relevant wire centers. . . .⁵

While PAETEC does not concede that the standard of analysis set forth in the *Omaha* and *Anchorage UNE Forbearance Orders* correctly implements the Congressional intent underlying Section 10 or prevents UNE forbearance when forbearance is not justified, PAETEC recognizes that indeed that is the applicable standard. Under that standard, there is a clear threshold factor for any possible Commission consideration of forbearance from Section 251(c)(3) unbundling. That factor is the actual “development of sufficient facilities-based competition,”⁶ or, put another way, “whether the . . . area [for which forbearance is requested] is sufficiently competitive to support forbearance”⁷

The Verizon Nov. 16 Ex Parte ignores this threshold factor and misrepresents the Commission precedents. Verizon argues that the Commission should in this case focus on a single element that has been in the past recognized as relevant to (but not controlling in) the analysis of impairment under Section 251: potential competition posed by potential competitors, or, as Verizon puts it, “whether competition is possible, not whether (or to what extent) actual competition is already occurring.”⁸ Verizon’s attempt to now redefine the multi-faceted *Omaha Forbearance Order* analysis must be rejected.

Verizon’s last minute attempt to re-write history is understandable. It recognizes what the non-RBOC commentators in this proceeding have uniformly pointed out: the evidentiary support that Verizon has presented to date clearly fails to meet the standard required under the *Omaha* and *Anchorage UNE Forbearance Orders*.

⁵ See *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, WC Docket No. 05-281, Memorandum Opinion and Order, 22 FCC Rcd 1958, 1959, para. 26 (2007) (“*Anchorage UNE Forbearance Order*”), *appeals dismissed, Covad Communications Group, Inc. v. FCC*, Nos. 07-70898, 07-71076, 07-71222 (9th Cir. 2007) (dismissing appeals for lack of standing); see also *Wireline Competition Bureau Discloses Cable Coverage Threshold in Memorandum Opinion and Order Granting ACS of Anchorage, Inc. Forbearance Relief in the Anchorage, Alaska Study Area*, WC Docket No. 05-281, Public Notice, DA 07-3041 (rel. July 6, 2007) (noting that the Commission granted targeted relief only to wire centers where GCI had at least 75 percent coverage).

⁶ *Omaha Forbearance Order* at para. 57.

⁷ *Anchorage UNE Forbearance Order* at paras. 26 and 9.

⁸ Verizon Nov. 16 Ex Parte at 6.

Even under Verizon's proposed standard, its petition would still have to be rejected. Despite acknowledging that "[i]n Omaha, the Commission's calculations of market share looked only at competition from cable and traditional CLECs," Verizon argues that "there are other intermodal alternatives that customers are using as a replacement for their wireline voice service and that therefore belong in the analysis as well."⁹ According to Verizon, these include wireless and over-the-top VOIP.¹⁰ However, Verizon provides no hard data about the extent of these modes of competition in the affected MSAs. Rather, it merely creates estimates based on its own allocations of broadband VOIP providers by state and of wireless subscribers who have "cut the cord."¹¹ The wireless and VOIP "data" offered by Verizon are no more specific to the six MSAs at issue than were the data rejected by the Commission in the Anchorage case.¹² Therefore, Verizon's wireless and VOIP data must be similarly rejected.

In order to prove its entitlement to forbearance, Verizon would have to demonstrate - even under its own analytic framework - the existence of competition in each separate product market based on the coverage of cable providers and traditional CLECs. But Verizon's Nov. 16 Ex Parte makes little attempt to demonstrate that even the single factor it espouses from the *Omaha* and *Anchorage UNE Forbearance Orders* - the facilities coverage measure - is met in what it has already conceded are the separate residential and business/enterprise markets.¹³ The Nov. 16 Ex Parte focuses almost completely on mass market residential coverage data.¹⁴ Other commentators have demonstrated that even within that market, contrary to the "facts" claimed by Verizon, the cable providers' coverage and market shares do not begin to approach the levels found necessary by the Commission in its *Omaha Forbearance Order*.¹⁵ To its credit, not even Verizon is bold enough to

⁹ *Id.*

¹⁰ *Id.* at 6-7.

¹¹ *Id.* at 7-8.

¹² See *Anchorage UNE Forbearance Order* at para. 29.

¹³ *Omaha Forbearance Order* at para. 22 (rejecting Qwest's definition of a single product market and identifying the residential/mass market and enterprise (business) markets as separate product markets for purposes of forbearance inquiry).

¹⁴ See Verizon Nov. 16 Ex Parte at 4-11.

¹⁵ See Letter from Brad Mutschelknaus, counsel for XO Communications et al, to Marlene H. Dortch, WC Docket No. 06-172 (filed Nov. 19, 2007) at 2-5; Letter from Brad Mutschelknaus,

suggest that the traditional CLECs are so much more widespread in the residential market in these six MSAs than they were in Omaha, so that their ubiquity somehow tips the balance in its favor.

Verizon's supporting data for forbearance in the business market are even weaker. The public Nov. 16 Ex Parte contains a two paragraph discussion of certain limited business E911 data and references to confidential data provided by various cable providers active in the six MSAs at issue.¹⁶ The cable providers involved have made confidential filings demonstrating their coverage and, to the extent possible, their actual share of the business market in the six MSAs.¹⁷ These do not show that the cable providers' coverage or shares of the business market even begin to approach the levels found necessary by the Commission in its *Omaha Forbearance Order*.¹⁸

The ramifications of the decision in this proceeding extend far beyond the six MSAs at issue. Premature termination of Verizon's UNE unbundling obligations based upon minimal evidence of actual competition in the affected areas and the application of a standard inconsistent with the Congressional intent underlying Section 10 will have snowballing, detrimental effects on competition and investment throughout the telecommunications industry.¹⁹ The inevitable "me too" forbearance petitions will follow, both from Verizon and from the other RBOCs. PAETEC, as one of the largest purchasers of special access services from Verizon, is acutely aware of the pricing discipline that the availability of DS1 and DS3 UNEs brings to the special access

counsel for Broadview Network Services Inc. et al, to Marlene H. Dortch, WC Docket No. 06-172 (filed Nov. 19, 2007) at 4-5.

¹⁶ See Verizon Nov. 16 Ex Parte at 4-11.

¹⁷ See Letter from Michael C. Sloan, counsel for Comcast Cable Communications LLC, to Marlene H. Dortch, WC Docket No. 06-172 (filed Nov. 9, 2007); Letter from J.G. Harrington, counsel for Cox Communications, LLC, to Marlene H. Dortch, WC Docket No. 06-172 (filed Oct. 30, 2007); Letter from K.C. Halm, counsel for Charter Communications Inc., to Marlene H. Dortch, WC Docket No. 06-172 (filed Nov. 6, 2007); Letter from Brian Murray, counsel for Time Warner Cable Inc., to Marlene H. Dortch, WC Docket No. 06-172 (filed Nov. 5, 2007); Letter from Phillip J. Macres, counsel for RCN Telecom Services, Inc., to Marlene H. Dortch, WC Docket No. 06-172 (filed Oct. 9, 2007).

¹⁸ See, e.g., Letter from Thomas Jones, counsel for One Communications Corp. et al, to Marlene H. Dortch, WC Docket No. 06-172 (filed Nov. 21, 2007) at 5-6.

¹⁹ The investment effects are most fully discussed in the Letter from Andrew D. Lipman, counsel for M/C Venture Partners and Columbia Capital, to Marlene H. Dortch, WC Docket No. 06-172 (filed Nov. 19, 2007).

market. Indeed, the Commission has previously recognized the importance of that UNE pricing discipline on Verizon's special access pricing.²⁰ Without that discipline, the prices of DS1 and DS3 special access services, which, in some markets, are already substantially higher than Verizon's UNE prices, would skyrocket, even for the largest buyers such as PAETEC. For competitors lacking PAETEC's purchasing power, the effect may well be to force them to leave markets where forbearance is granted. Indeed, that is precisely the fate that has befallen McLeod since the Commission implemented UNE forbearance for Qwest in the *Omaha Forbearance Order*. Faced with exorbitant price increases and the refusal of Qwest to negotiate a realistic commercial agreement, McLeod has announced its intention to withdraw from the Omaha market.²¹ It has begun scaling back its sales efforts in Omaha in anticipation of doing so.²² In addition, two other CLECs, Eschelon and Integra, have abandoned plans to enter the Omaha market because of Qwest's post-forbearance tactics.²³

Given the myriad shortcomings in Verizon's data, it is impossible for the Commission to act in a manner consistent with Section 10 and at the same time grant the forbearance request.

Therefore, the petition should be denied in its entirety.

Respectfully submitted,

/s/ _____

²⁰ See Memorandum Opinion and Order, *In the Matter of Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, FCC WC Docket No. 05-75 (rel. Nov. 17, 2005) at para. 55.

²¹ See, e.g., Letter from Chris MacFarland, Group Vice President-Chief Technology Officer, McLeod USA, to Marlene H. Dortch, WC Docket No. 05-281 (filed Dec. 15, 2006) at 1-2.

²² See, e.g., Reply to Opposition of McLeodUSA Telecommunications Services, Inc., WC Docket No. 04-223 (filed Sept. 13, 2007) at 24-25.

²³ See, e.g., Testimony of Brad Evans, Chairman of Cavalier Telephone & TV, before the House of Representatives Committee on Energy and Commerce and the Internet Subcommittee, October 2, 2007 at 8 (available at http://energycommerce.house.gov/cmte_mtg/110-ti-hrg.100207.Evans-testimony.pdf).

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